IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

versus

THE TRAVELERS INSURANCE CO. and LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

versus

AVONDALE SHIPYARDS, INC.

On Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE, ON BEHALF OF MINUS AIZEN, INJURED CLAIMANT IN DONOVAN versus AVONDALE.

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MAY IT PLEASE THE COURT:

STATEMENT OF POSITION

This brief is submitted on behalf of Minus Aizen, the totally and permanently disabled young man who was the beneficiary of the compensation award made by the Honorable P. J. Donovan, Deputy Commissioner, who is now one of the petitioners before this Honorable Court.

It is Minus Aizen's position that the judgments of the Court of Appeals should be reversed and that the judgments of the District Courts should be reinstated.

SUMMARY OF ARGUMENT

POINT I

In 1917 this Honorable Court held in *Southern Pacific Co. v. Jensen* (244 U. S. 205) that the survivors of longshoremen killed on navigable waters could not recover under a state workmen's compensation act. Since there was then no federal compensation statute, the effect of the *Jensen* case was to deprive certain employees of any compensation remedy. In order to partially rectify this situation, the Court adopted a so-called "local concern" doctrine which had the effect of making the state compensation acts applicable to some injuries which did, in fact, occur on navigable waters. With the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, however, employees injured on navigable waters were given a uniform federal compensation remedy. Thus, the necessity for utilizing the "local concern" exception to the rule of *Jensen* disappeared.

Since this "local concern" doctrine was not incorporated into the federal statute, and since the doctrine has now outlived its *raison d'etre*, the nature of an injured *employee's* duties is not relevant to a determination of his compensation rights.

It seems not unlikely that these considerations — absence of a "local concern" doctrine in the federal act and the absence of any present necessity for such a doctrine — prompted the decision of this Honorable Court in *Pennsylvania Railroad Co. v. O'Rourke* (344 U.S. 334) wherein it was clearly held that there are now only two requisites to the application of the Longshoremen's and Harbor Workers' Compensation Act: (1) that the *injury* be incurred on *navigable waters* of the United States; and (2) that the *employer* be engaged in "*maritime employment*".

Notwithstanding the presence of both of these criteria in the instant case, the Court of Appeals for the Fifth Circuit has held that the federal compensation statute cannot apply to the claims of Minus Aizen. This holding, we submit, is contrary to the *O'Rourke* decision and, therefore, is erroneous.

POINT II

The appellate opinions below are predicated upon the 1922 decision of this Honorable Court in *Grant Smith-Porter Ship Co. v. Rhode* (257 U. S. 469). In that case, the Court held that a carpenter, who had contracted with his employer to construct a vessel and to accept state compensation benefits in the event of injury, was relegated to recovery under the state act for injuries incurred upon navigable

waters in the course of his employment. The facts of the instant cases are so materially different from those in *Rhode* that the latter case should not control the result in the instant cases which involve employers engaged in substantial maritime activities and do *not* involve any pre-injury contracts requiring the employees to accept state compensation benefits in the event of injuries on navigable waters.

Moreover, these distinguishing factors in the instant cases affect them with such a "maritime flavor" that they fall within the principle of *Davis v. Department of Labor and Industries* (317 U. S. 249) which allows claimants a *choice* between state and federal compensation remedies.

ARGUMENT

POINT I

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT IS APPLICABLE TO ALL INJURIES INCURRED ON NAVIGABLE WATERS BY EMPLOYEES WHOSE EMPLOYER IS ENGAGED IN MARITIME EMPLOYMENT, REGARDLESS OF THE PARTICULAR JOB IN WHICH THE INJURED EMPLOYEE WAS ENGAGED AT THE TIME OF HIS ACCIDENT.

The seeds of the present controversies were sown by the landmark decision of this Honorable Court in the case of *Southern Pacific Co. v. Jensen* (244 U. S. 205), in which it was held that since the injuries from which a workman died were sustained aboard a vessel afloat in navigable waters, his survivors could not recover against his employer under a state workmen's compensation act. The effect of

the *Jensen* decision in 1917 was to deprive certain workmen of a compensation remedy for injuries incurred on navigable waters since there was no uniform federal compensation statute at that time. The result which *Jensen* brought about came at a time when the workmen's compensation concept in the United States was in its ascendency, for it was between 1910 and 1920 that workmen's compensation legislation was enacted in all but eight states. 1 Larson, Workmen's Compensation §5.30 (1952).

Although *Jensen* rested upon solid constitutional grounds, the decision nevertheless was contrary to the prevailing policy of the times: to provide compensation coverage to workmen in all types of hazardous employments.

Therefore, in the years prior to 1927, there was ample reason for adopting some concept which would broaden the application of workmen's compensation coverage and still operate within the constitutional limitations which the *Jensen* decision recognized. The concept which seems to have lent itself best to the accomplishment of the goal of molifying the effects of *Jensen* is the idea of allowing the state compensation statutes to apply whenever it could be said with reason that the subject matter out of which the injury arose was principally of "local concern", not involving any national activity and not in conflict with any federal law on the same subject.[1]

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[1] The local concern doctrine was actually suggested by the *Jensen* Opinion itself when it stated that no state legislation can be upheld if it "works material prejudice to the characteristic feature of the general maritime law or interferes with proper harmony and uniformity of that law in its international and interstate relations". Southern Pacific Co. v. Jensen, 244 U. S. 205, 216 (1917).

This means of circumventing *Jensen* served a valuable purpose prior to the enactment of the federal statute. With its enactment, however, a uniform compensation remedy was afforded to workmen for injuries sustained on navigable waters; thus, the sole purpose of the "local concern" doctrine disappeared. Moreover, the government's brief clearly demonstrates that Congress did *not* intend to incorporate the "local concern" doctrine within the federal act since all specific references to the doctrine were deleted from the final draft of the statute. Brief for the Petitioners, pp. 15-16, 31-45.

Although it appears that there are cases in which this Court continued to consider the "local concern" doctrine with regard to injuries occurring on navigable waters *after* the enactment of the federal statute,[2] it is submitted that these decisions have resulted in so much confusion and uncertainty that they support the proposition that the entire "local concern" concept has outlived its usefulness and should be unequivocally abandoned.[3]

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[2] *Compare* Carlin Constr. Co. v. Heavey, 299 U. S. 41 (1936) (land-based construction worker injured on boat while going to work on coastal island); Sultan Ry. & Timber Co. v. Department of Labor, 277 U. S. 135 (1928) (logger injured while assembling log booms on navigable waters); Jeffers v. Foundation Co., 85 F. 2d 24 (2d Cir. 1936) (bridge construction worker standing inside a caisson sunk in river); New Amsterdam, 87 F. 2d 332 (2d Cir. 1937) (lighthouse construction worker injured by fall into lake), *with* Parker v. Motor Boat Sales Inc., 314 U. S. 244 (1941) (janitor fatally injured while placing outboard motor on pleasure craft); Union Oil Co. v. Pillsburg, 63 F. 2d 925 (9th Cir. 1933) (watchman injured on vessel in dry dock).

[3] See discussion in Davis v. Dept. of Labor and Indus., 317 U. S. 249, 252 (1942). It is interesting to observe that the Court of Appeals for the Fifth Circuit through the author of the opinion presently under review has recently referred to this "local concern doctrine" as "somewhat hoary." Thibodeaux v. J. Ray McDermott & Co., 276 F. 2d 42 (5th Cir. 1960).

The first step toward resolution of the unfortunate situation which arose out of the continued application of the "local concern" concept and its illogical offspring, the "twilight zone",[4] was taken by this Honorable Court in 1956 when it decided the case of *Pennsylvania Railroad Co. v. O'Rourke* (344 U. S. 334). In this case the Court plainly held that the applicability of the federal compensation statute did *not* depend *upon the nature of the injured employee's duties*. The sole criteria were: (1) that the *injury* be sustained *on navigable waters* of the United States; and (2) that the *employer* be engaged, through *any* of its employees, *in maritime employment*. If these criteria were met, the federal act was applicable, regardless of the type of activity in which the injured workman was engaged.

The certainty and logic of the *O'Rourke* result revert to the simple precepts upon which the *Jensen* decision rests: if the injury occurs on the water, the maritime law, as now modified by the federal compensation act,[5] applies; if it occurs ashore, the state may provide a remedy.

Applying these simple rules to the instant cases, it becomes apparent that the judgments of the district courts are correct and should be reinstated. Minus Aizen was injured upon navigable waters of the United States while working for an employer with hundreds of employees in maritime employment. Therefore, it is submitted that he is entitled to the benefits of the Longshoremen's and Harbor Workers' Compensation Act.

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[4]Conceived in Davis v. Dept. of Labor and Industries, 317 U. S. 249.
[5]In Crowell v. Benson, 285 U. S. 22 (1932) this Court upheld the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, as a valid extension and modification of the general maritime law of the United States.

POINT II

EVEN IF THE FEDERAL COMPENSATION ACT IS NOT THE EXCLUSIVE REMEDY OF THE INJURED EMPLOYEE IN THIS CASE, ITS FACTS ARE SUCH THAT HE SHOULD HAVE A CHOICE OF REMEDIES PURSUANT TO THE "TWILIGHT ZONE" PRINCIPLES PREVIOUSLY ENUNCIATED BY THIS HONORABLE COURT.

The opinions below rest primarily upon the appellate court's interpretation of a 1922 decision of this Honorable Court in the case of *Grant Smith-Porter Ship Co. v. Rhode* (257 U. S. 469). The decision in *Rhode*, according to the Court of Appeals, *precludes* the application of the Longshoremen's and Harbor Workers' Compensation Act to the instant cases even under the "twilight zone" principle of *Davis v. Department of Labor and Industries* (317 U. S. 249). The appellate decisions below seem to be based upon the premise that *Rhode*, once and for all, stands immutably for the proposition that injuries incurred on navigable waters aboard a launched, floating, but incomplete, vessel are solely within the jurisdiction of the state in which such injuries occur.

As has been previously submitted, had the *Rhode* case arisen *after* the passage of the Longshoremen's Act there would have been no need to resort to a state act in order to insure a compensation remedy. However, assuming that the state compensation act would have been applied in *Rhode*, notwithstanding the existence of a federal act, the facts and circumstances in the *Rhode* case are not sufficiently identical to those of the instant cases so as to de-

prive the instant claimants of their awards under the Longshoremen's and Harbor Workers' Compensation Act.

In the first place, the employer in *Rhode* was apparently engaged solely in the *construction* of vessels. Whereas, in the instant cases the employers were engaged extensively in the classic maritime activity of ship repair, as well as in new construction. Therefore, the activities of the employers in these cases were at least as much maritime as they were "local".

Secondly, and most significantly, the *Rhode* decision dealt with a rather unique situation — not present in the instant cases — in which there was a definite pre-injury *contractural* agreement between the parties as to what law should govern their rights and liabilities in the event of the employee's injury.

In *Rhode*, therefore, this Court was construing the enforceability of a voluntary contract between the injured workman and his employer. This was a contract which had been consciously made with specific reference to the laws of the State of Oregon.

This clearly appears from the following portion of the Court's opinion:

> "Prior to the time of injury, neither . . . the employer . . . nor the workman had notified the appropriate state authority of any rejection of the Workmen's Compensation Act [of Oregon], and up to the time of injury there had been deducted and paid over to the commission . . . payments from

> wages earned and paid . . . the workman . . ." (257 U. S. at page 475)

Upon the basis of these particular facts, the Court reasoned that:

> "It cannot be properly said that they consciously contracted with each other in contemplation of the general maritime law." (257 U. S. at page 476)

And, in fact, the Court then concluded that:

> ". . . the parties contracted with reference to the state statute." (257 U. S. at page 477)

Thereupon, and, we submit, only for this reason, the Court felt that:

> "Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, *as between themselves*, by local rule would not *necessarily* work material prejudice to any characteristic feature of the general maritime law. . . ." (257 U. S. at page 476) (Emphasis added)

Minus Aizen, however, did not contract with his employer "to build a ship". Nor did he agree in advance of his injuries to receive the meagre benefits of the Louisiana compensation laws if he was injured upon navigable waters of the United States in the course of his employment. Aizen's duties, under his employment contract, may be seen from the record:

> "Notwithstanding that Aizen worked solely on new construction and performed no work on repair jobs, other workmen in particular crafts assigned to work on repair of vessels did on rare occasions perform work on new construction. . . . *The same is true* for workmen engaged in new construction of vessels." (Emphasis added.) (R. 87-88).

There was no agreement, or practice, from which to infer that the employees' work was to be purely "local".

Therefore, since the activities of the employer in the *Rhode* case were apparently different from those of the instant employers and since the employment contract in *Rhode* was made with specific reference to state law, whereas, such was not so in the instant cases, it is respectfully submitted that the *Rhode* decision is not, and should not be, dispositive of the instant controversies.

Moreover, assuming that the *Rhode* case is used by analogy to apply the state compensation act to the instant cases, we submit, because of their "maritime flavor", that the facts of the instant cases are enough at variance with those of the *Rhode* case to create a doubt sufficient to bring the instant cases within the "twilight zone" principle of *Davis v. Department of Labor and Industries*, *supra*, and, thus, allow Minus Aizen to choose between a state and federal compensation remedy. Since the federal remedy has been chosen, his compensation award should be reinstated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the Court of Appeals should be reversed and that the judgments of the District Courts should be reinstated.

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.